93-706
No. _____

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In The

Supreme Court of the United States

October Term, 1993

MICHAEL D. GRIFFES, COMMISSIONER OF THE VERMONT DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

GREG R. BARRINGER and JUDITH M. BARRINGER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tax Injunction Act is a bar to federal jurisdiction where state law has established an administrative remedy and a right of judicial review?

2. Whether it is a purpose of the Commerce Clause to protect state residents from their own state taxes?

3. Whether the Commerce Clause obligates Vermont to apportion a tax on the Vermont use of a motor vehicle using a formula that would deny Vermont *any* portion of that tax?

4. Whether a tax imposed on Vermont residents who register a vehicle for use in Vermont discriminates against Interstate Commerce?

LIST OF PARTIES

The parties to the proceedings are Petitioner Michael D. Griffes, the Vermont Commissioner of Motor Vehicles, and Respondents Greg R. Barringer and Judith N. Barringer.

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PETITION FOR WRIT OF CERTIORARI

Michael D. Griffes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 964 F.2d 1278 (2d Cir. 1992) and 1 F.3d 1331 (2d Cir. 1993), and are reprinted at pages 3a and 32a of the Appendix. The second of the two District Court opinions is reported at 801 F. Supp. 1282 (D. Vt. 1992); both opinions are reprinted, at pages 1a and 16a of the Appendix.

JURISDICTION

The final judgment of the Court of Appeals was entered on August 9, 1993. A petition for rehearing was denied on October 5, 1993. On October 25, 1993 the Court of Appeals stayed its mandate pending this application for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution provides that:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

2. The Tax Injunction Act, 28 U.S.C. §1341 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

3. The Vermont Administrative Procedure Act, Vt. Stat. Ann. tit. 3, ch. 25, provides for judicial review of "contested cases" and defines "contested cases". The relevant sections are reprinted at page 58a of the Appendix.

4. The Vermont Motor Vehicle Purchase and Use Tax, Vt. Stat. Ann. tit. 32, ch. 219, imposes a five percent tax on vehicles registered for use in Vermont. The relevant sections are reprinted at pages 59a-61a of the Appendix.

STATEMENT OF THE CASE

Plaintiffs filed a civil rights action to enjoin Vermont's motor vehicle purchase and use tax, claiming jurisdiction under 28 U.S.C. §1331. The District Court dismissed the action on grounds that plaintiffs had a state remedy, but the Court of Appeals reversed and remanded. On remand, the District Court sustained the tax, but a divided Court of Appeals reversed again, holding that the tax violated the Commerce Clause.

The first Court of Appeals ruling renders the Tax Injunction Act virtually meaningless. The second misapplies the Commerce Clause and rewrites the "fair apportionment" and "discrimination" elements of the *Complete Auto* test[1] fashioned by this Court.

1. Vermont's Motor Vehicle Purchase and Use Tax.

Vermont requires its residents to register motor vehicles owned and operated by them, Vt. Stat. Ann. tit. 23, §301, and as a condition of registration requires payment of a purchase and use tax, Vt. Stat. Ann. tit. 32, §8905. Whether assessed as a purchase tax (on vehicles purchased in Vermont) or as a use tax (on vehicles purchased elsewhere) the tax rate is the same – five percent of a car's depreciated value – and the tax is collected at the time of first registration. *Id.*, §§8903(a) and (b) and 8905(a) and (b). The purpose of the tax is to "improve and maintain the state and interstate highway systems." *Id.* §8901. Tax proceeds are paid into the state's transportation fund. *Id.* §8912.

2. Facts.

Plaintiffs purchased a Mazda automobile in Connecticut in 1988, when they were residents of that state, and paid a $1,085 sales tax to Connecticut. App. 63a. Connecticut also imposed an annual personal property tax on the

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[1] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

vehicle, which plaintiffs paid in 1988, 1989 and 1990. App. 70a-71a.

Plaintiffs moved to Vermont in August of 1990, bringing the Mazda and their other vehicles with them. App. 63a. They inquired then about registering the Mazda in Vermont and were told that the use tax would be $280. App. 64a. Rather than pay the tax they operated the vehicle for two years, even after the Connecticut registration expired, without registering it in Vermont. App. 68a-70a.

At no time did the plaintiffs ask the defendant or his employees whether the purchase and use tax might be subject to refund, whether there was a refund process or whether he would consider their objections to the tax at an administrative hearing. App. 71a-73a.

3. Proceedings Below.

Plaintiffs filed a civil rights action in District Court[2] seeking declaratory relief and an injunction against Vermont's motor vehicle purchase and use tax, as well as attorney's fees. App. 62a. They proposed to register their Mazda for use in Vermont, but sought to avoid the tax because they had paid a sales tax to Connecticut three years earlier. They claimed that in these circumstances the Vermont tax violated the Commerce Clause.

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[2] Plaintiffs withdrew an identical action they had filed in state court when the defendant moved to dismiss on grounds they had an administrative remedy.

The District Court initially dismissed the action, holding that plaintiffs had a complete remedy under a state tax refund statute, citing a recent ruling by the Vermont Supreme Court. The Court of Appeals reversed, rejecting the plain remedy described in the state court ruling.

On remand the District Court determined that Vermont's motor vehicle use tax did not touch interstate activity at all, since it was a tax on the Vermont use of a vehicle and applied equally to all vehicles registered in Vermont, regardless of origin. A divided Court of appeals reversed again and declared the tax unconstitutional. The majority's decision conflicts with Supreme Court precedents which limit who can maintain a Commerce Clause action against a state tax, explain and apply the "fair apportionment" test and affirm that the very tax in question does *not* discriminate in favor of Vermont businesses.

REASONS FOR GRANTING CERTIORARI

The decisions of the Court of Appeals warrant review by this Court for two reasons: (1) the Court's interpretation of the Tax Injunction Act invites federal jurisdiction in cases where state court remedies are plainly available; and (2) the Court's decision on the merits is in direct conflict with at least three precedents of this Court.

I. THE COURT OF APPEALS' CONSTRUCTION OF THE TAX INJUNCTION ACT INVITES LITIGATION OF STATE TAX ISSUES IN FEDERAL CIVIL RIGHTS ACTIONS.

A. Vermont Affords An Administrative Remedy To Secure The Refund Of An Unconstitutional Tax.

The District Court initially dismissed this action because plaintiffs had "a plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act. 28 U.S.C. §1341; *California v. Grace Brethren Church*, 457 U.S. 393 (1982). The District Court held that Vt. Stat. Ann. tit. 32, §8914 "provides a judicially reviewable administrative procedure to recover taxes wrongfully exacted by the state, including taxes subsequently found to have been levied in violation of the Constitution." App. 2a. That was the precise holding of the Vermont Supreme Court in a case decided less than a year earlier. *See Williams v. Vermont*, 156 Vt. 42, 589 A.2d 840 (1990), *cert. denied*, 112 S.Ct. 81 (1991), and *cert. denied*, 112 S.Ct. 590 (1991).

The Court of Appeals expressed doubt that plaintiffs would be allowed to advance their Commerce Clause argument in the administrative proceeding. The Court's opinion cites bits of language from the *Williams* case that are supposed to undermine the commissioner's authority to decide constitutional issues in an administrative forum. However, the Court disregarded the matters at issue in the case and the unequivocal holding of the Vermont Supreme Court.

The plaintiffs in *Williams* made exactly the same Commerce Clause argument as the plaintiffs are making

in this case. (This comes as no surprise, since the named plaintiff in *Williams* is one of the attorneys for the plaintiffs here.) They argued that the Vermont Motor Vehicle Purchase and Use Tax violated the Commerce Clause. Moreover, the Vermont Supreme Court was well aware of the plaintiffs' constitutional argument, noting that: "Williams and Levin continue to argue that the statute, even as interpreted and administered by the Department, violates the Privileges and Immunities and Commerce Clause." 156 Vt. at 54, n.11, 589 A.2d at 847 n.11.

The Vermont Supreme Court also discussed the questions that would have to be decided in order to address the plaintiffs' arguments. Two of those questions concerned the administration and enforcement of the use tax and the department's compliance with the statute. But the third question listed by the Court was whether the department's administration of the tax "violate[d] the Commerce and Privileges and Immunities Clauses" even if it did comply with the statute. 156 Vt. at 54, 589 A.2d at 847.

Finally, the Vermont Supreme Court was crystal clear in its holding as to what the defendant, the commissioner of motor vehicles, had jurisdiction to decide in the administrative proceeding. "The Commissioner had jurisdiction to decide *all* of these claims." *Id.* (emphasis added). Hence the conclusion:

> All plaintiffs in this case, therefore, had an available remedy in §8914 but chose not to pursue it.

Id.

The plaintiffs here are situated exactly like the plaintiffs in *Williams*. They had a remedy in §8914 and chose not to pursue it. There is simply no way to reconcile the Court of Appeals' doubts about the Commissioner's authority to decide the Commerce Clause claim with the Vermont Supreme Court's decision that "he had jurisdiction to decide" that claim.

B. Decisions Made In Tax Refund Hearings Are Subject To Review By The Vermont Supreme Court.

The Court of Appeals also expressed doubt that §8914 tax refund proceedings are subject to judicial review in the Vermont courts. That doubt is dispelled by the plain language of Vermont's Administrative Procedure Act. The Act provides that a person "who is aggrieved by a final decision in any contested case may appeal that decision to the [Vermont] supreme court." Vt. Stat. Ann. tit. 3, §815(a). In fact, appeals of contested cases adjudicated by the Department of Motor Vehicles "*must* be made directly to the [Vermont] Supreme Court." *In re Kelscot, Ltd.*, 152 Vt. 579, 580, 568 A.2d 378, 380 (1989) (emphasis added).

The Court of Appeals questioned whether a §8914 proceeding is a "contested case", a case in which a hearing is "required by law". *See* Vt. Stat. Ann. tit. 3, §801(b)(2). *Williams* decided this issue as well, holding that: 1) "Vermont must afford a remedy and a meaningful remedy" to taxpayers seeking a refund of improperly exacted taxes; 2) Due Process requires that the remedy encompass " 'some form of hearing' " (citing *Mathews v.*

Eldridge, 424 U.S. 319, 333 (1976) and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 n.17 (1990)); and 3) the remedy required by the Constitution is the one provided by §8914. 156 Vt. at 52-54, 589 A.2d at 846-47.

The language of the Vermont Administrative Procedure Act and the *Williams* opinion could not be plainer, and the remedy of an administrative hearing with a direct appeal to the State's highest court could not be more speedy and efficient.

In the final analysis the Court of Appeals based its Tax Injunction Act decision on "the uneasy feeling that if there is a judicial remedy available to the Barringers in Vermont, it cannot fairly be said to be plain." App. 14a. If an "uneasy feeling" is the new gateway to federal jurisdiction in state tax cases, and if that "feeling" cannot be dispelled by statutes and precedents as explicit and dispositive as Vermont's Administrative Procedure Act and the Vermont Supreme Court's *Williams'* opinion, the federal district court will quickly become the forum of choice for all manner of state tax cases. A federal civil rights action with the potential for attorney's fees will always be more attractive to taxpayers than a state proceeding for a refund.

II. THE COURT OF APPEALS' COMMERCE CLAUSE DECISION CONFLICTS WITH AT LEAST THREE OF THIS COURT'S PRECEDENTS.

A. The Court Of Appeals' Decision Conflicts With *Goldberg v. Sweet.*

The plaintiffs in this action became residents of Vermont in August of 1990, a full year before they brought this action. They brought the action to enjoin a motor vehicle tax which applies only to Vermont residents. They based their suit on the Commerce Clause.

In *Goldberg v. Sweet*, 488 U.S. 252 (1989), this Court rejected the possibility that the Commerce Clause might support such an action. The Court stated categorically that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." 488 U.S. at 266. The purpose of the Commerce Clause is to " 'guarantee . . . a free trade area among the States . . . ' " *Id.* (quoting *American Trucking Assns. v. Scheiner*, 483 U.S. 266, 281 (1982)).

The Court of Appeals cited *Goldberg* for various principles but never addressed the fundamental flaw in plaintiffs' lawsuit. Indeed, there is no way to address that flaw. Plaintiffs sued to enjoin "their own state taxes", and *Goldberg* teaches that the Commerce Clause may not be used for that purpose.

B. The Court of Appeals' Decision Conflicts With *Container Corporation of America v. Franchise Tax Board.*

The Court of Appeals held that Vermont's tax structure violates the Commerce Clause because "it does not fairly apportion the tax among interstate and intrastate commerce . . . " App. 50a. As the dissent points out, however, a tax levied on Vermont residents for the use of Vermont roads cannot be apportioned like a tax that actually falls on commerce – for example, a tax on the income of a multi-state business. App. 52a-54a. Thus neither the plaintiffs in the case nor the Court of Appeals' majority stated "what the Vermont tax should be apportioned with or against." *Id.* at 54a.

The majority's intent, and its error, is revealed by its discussion of options Vermont might pursue in response to its ruling. The only option sanctioned as one that would "fairly apportion" the tax was the adoption of a credit for taxes paid to other states. App. 47a. In effect, in this case, that apportionment formula would mean that Vermont's share of the tax would be zero, since a credit for the $1,000 that plaintiffs paid to Connecticut would more than offset their $280 obligation to Vermont. The majority expressly endorsed that result by suggesting that Vermont "abandon its use tax altogether". *Id.*

In its Commerce Clause rulings this Court has flatly rejected this zero-tax approach to apportionment. In one case, for example, it hypothesized that:

> . . . California could try to avoid double taxation simply by not taxing appellant's income at all,

> even though a good deal of it is plainly domestic. But no party has suggested such a rule, and its obvious unfairness requires no elaboration.

Container Corp of America v. Franchise Tax Board, 463 U.S. 159, 190 (1983).

The dissenter on the Court of Appeals used equally direct language to decry the result sanctioned by his colleagues:

> Appellants' actual contention is that anyone who pays a sales tax when purchasing a car in Connecticut is entitled to a free ride on the highways of Vermont if, one, two, three, four or five years following the purchase, he or she moves with the car to Vermont.

App. 54a. *Compare Williams v. Vermont*, 472 U.S. 14, 25 (1985) (Vermont's use tax is based on "the principle that those using the roads should pay for them.")

It is by now settled that "the central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, supra, 488 U.S. at 260-61. If the plaintiffs or the Court of Appeals were able to identify an interstate transaction in the present case, they might reasonably conclude that Vermont's "fair share" of the tax is some amount less than $280. They have not identified an interstate transaction and they most certainly cannot reconcile their notion of a "fair apportionment" with *Container Corp.* or *Goldberg*, or with fundamental concepts of fairness and common sense.

C. The Court of Appeals' Decision Conflicts With *Williams v. Vermont.*

In the original *Williams* case this Court reserved the question whether the Vermont tax violated the Commerce Clause, *Williams v. Vermont*, 472 U.S. 14, 21-22 (1985), but did address a related issue. The Court decided that the tax "in no way protects local business." *Id.* at 25. In the present case the Court of Appeals held the exact opposite, asserting that the tax "discriminate[s] against interstate commerce in favor of Vermont businesses." App. 50a.

The error in the Court of Appeals' decision is revealed by this Court's analysis:

> A use tax is generally perceived as a necessary complement to the sales tax, designed to " 'protect a state's revenues by taking away the advantages to residents of travelling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition . . . ' " This customary rationale for the use tax has no application to purchases made out-of-state by those who were not residents of the taxing state at the time of purchase. These home-state transactions cannot be seen as lost Vermont sales, and are certainly not ones lost as a result of Vermont's sales tax. Imposing a use tax on them in no way protects local business.

472 U.S. at 24-25.

As this Court observed, Vermont does not have "a typical sales and use tax scheme." *Id.* at 24. The Court of Appeals did not recognize the distinction between the Vermont tax and the typical tax, and assumed a consequence that does not attach. As the statutes provide and

as the district court found, "Vermont imposes the *same* tax on using a car in this state (or, more precisely, it employs the same formula for calculating the tax) whether the car is purchased here or elsewhere." App. 28a.

CONCLUSION

For these reasons the petition should be granted and the judgment below reversed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Greg R. Barringer and Judith M. Barringer, Plaintiffs,	:	Civil Action File No. 91-231
v.	:	
Michael D. Griffes, Defendant.	:	

OPINION AND ORDER

(Filed Sept. 14, 1991)

Plaintiffs filed a complaint seeking a declaratory judgment that Vermont's motor vehicle purchase and use tax, 32 V.S.A. §§ 8901 *et seq.*, violates the Commerce Clause and an injunction preventing defendant, the Commissioner of the Vermont Department of Motor Vehicles, from collecting the tax from plaintiffs.

This court has no jurisdiction over this action by virtue of the Tax Injunction Act, 28 U.S.C. § 1341, which bars federal district courts from issuing injunctive or declaratory relief to parties challenging "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." See *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (Act proscribes declaratory judgments as well as injunctive relief); *Keleher v. New England Telephone & Telegraph Co.*, No. 91-7199, slip op. at 3 (2d Cir. July 30, 1991) (Act creates an absolute prohibition on federal judicial involvement in state tax schemes).

Plaintiffs contend, however, that the Tax Injunction Act does not bar the present action because no plain, speedy and efficient remedy exists in the courts of Vermont. The court disagrees. 32 V.S.A. § 8914 provides a judicially-reviewable administrative procedure to recover taxes wrongfully exacted by the state, including taxes subsequently found to have been levied in violation of the Constitution. *Williams v. Vermont*, 2 Vt. Law W. 47, 50 (1991). "[F]ederal courts have expressed a strong preference that issues of state taxation be litigated in state courts through a suit for refund rather than in federal courts through a suit for declaratory or injunctive relief." *Alcan Aluminum Ltd. v. Department of Revenue of State of Oregon*, 724 F.2d 1294, 1298 (7th Cir. 1984).

The action is accordingly DISMISSED.

Plaintiffs' motion for a preliminary injunction is DENIED.

Dated at Burlington, in the District of Vermont, this 3 day of September, 1991.

/s/ Fred I. Parker
Fred I. Parker
District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 839 – August Term, 1991

Argued: January 22, 1992 Decided: MAY 18 1992

Docket No. 91-7902

GREG R. BARRINGER; JUDITH M. BARRINGER,

Plaintiffs-Appellants,

v.

MICHAEL D. CRIFFES,

Defendant-Appellee.

Before: NEWMAN and KEARSE, *Circuit Judges*, and CEDARBAUM, *District Judge*.*

Appeal from a September 3, 1991 order of the United States district Court for the District of Vermont, Fred I. Parker, *Chief Judge*, dismissing this action for a declaratory judgment that Vermont's motor vehicle purchase and use tax violates the Commerce Clause and for an injunction prohibiting the Commissioner of Motor Vehicles from collecting the tax. The district court held that the Tax Injunction Act, 28 U.S.C. § 1341 (1988), bars a federal district court from exercising jurisdiction over the action.

Vacated and remanded.

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* Honorable Miriam Goldman Cedarbaum, of the United States District Court for the Southern District of New York, sitting by designation.

Norman Charles Williams, Burlington, VT (Gravel & Shea, Burlington, VT, Jerome F. O'Neill, O'Neill and Crawford, Burlington, VT, of counsel) *for plaintiffs-appellants.*

William Griffin, Chief Assistant Attorney General, Montpelier, VT (Jeffrey L. Amestoy, Attorney General, Attorney General's Office, State of Vermont, Montpelier, VT, of counsel) *for defendant-appellee.*

CEDARBAUM, *District Judge:*

This appeal presents the question whether the courts of Vermont afford automobile owners who challenge the constitutionality of the state's motor vehicle use tax a "plain, speedy and efficient" remedy within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341 (1988).

THE FACTS

In 1988, Greg and Judith Barringer, who were residents of Connecticut, purchased a Mazda automobile and paid the 7.5 percent Connecticut sales tax. In 1990, they moved to Vermont where they were required to pay a tax of four percent of the value of their automobile upon first registering it in the state. *See* Vt. Stat. Ann. tit. 32, § 8903(b) (1981 & Supp. 1989).

The Barringers refused to pay the tax and filed this action in federal court, alleging that imposition of the Vermont motor vehicle use tax violates their rights under 42 U.S.C. § 1983 (1988) and the Commerce Clause of the United States Constitution because it does not grant all motor vehicle registrants a credit for sales tax previously

paid in another state.[1] Concluding that Vermont's administrative tax refund procedure, Vt. Stat. Ann. tit. 32, § 8914 (1981), provides a plain, speedy and efficient remedy, and that therefore, the Tax Injunction Act, 28 U.S.C. § 1341, precludes the Barringers from litigating these claims in federal court, the district court dismissed the complaint. For the reasons discussed below, we disagree.

DISCUSSION

The Tax Injunction Act prohibits federal courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The Act prohibits declaratory as well as injunctive relief. *California v. Grace Brethren Church*, 457 U.S. 393, 408-11 (1982). To come within the statutory ban, the remedy available in the state courts must provide the taxpayer with a " 'full hearing and judicial determination' at which [the taxpayer] may raise any and all constitutional objections to the tax." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 515 n.19 (1981).

The district court held that the courts of Vermont offer a plain, speedy and efficient state remedy because the Vermont motor vehicle tax refund statute, Vt. Stat. Ann. tit. 32, § 8914, "provides a judicially-reviewable administrative procedure to recover taxes wrongfully

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[1] Vermont residents who purchase cars and pay sales tax in another state, but do not register their cars outside Vermont, receive a tax credit equal to the amount of the tax paid outside Vermont. 32 Vt. Stat. Ann. tit. 32, § 8911(9) (1981).

exacted by the state, including taxes subsequently found to have been levied in violation of the Constitution." Opinion and Order at 2 (citing *Williams v. State*, 156 Vt. 42, 589 A.2d 840 (1990), *reh'g denied*, 156 Vt. 42, 589 A.2d 840, *cert. denied*, 112 S. Ct. 81, and *cert. denied*, 112 S. Ct. 590 (1991)). Section 8914 provides that "[a]ny overpayment of [a motor vehicle] tax as determined by the commissioner shall be refunded."

Both appellee and the district court rely upon *Williams* to establish that the Commissioner can and will hear the Barringers' constitutional challenge to the tax. Prior to the Vermont Supreme Court's decision in *Williams*, Vermont law prohibited the Commissioner from deciding the constitutionality of a state tax. *See Westover v. Village of Barton Elec. Dep't*, 149 Vt. 356, 359, 543 A.2d 698, 700 (1988). Thus, when the taxpayers in *Williams* applied to the Commissioner for a refund of the same motor vehicle use tax challenged by the Barringers on the ground that it violated the United States Constitution, the Department of Motor Vehicles denied the application because it felt constrained to assume the constitutionality of the state tax statute. *Williams*, 589 A.2d at 842.

A state court remedy is not "plain" within the meaning of the Tax Injunction Act if there is such uncertainty concerning the state remedy "as to make it speculative . . . whether the State affords full protection to the federal rights." *Hillsborough v. Cromwell*, 326 U.S. 620, 625 (1946). Therefore, the central question before us is whether the Vermont Supreme Court's decision in *Williams* provides sufficient certainty that the Commissioner, despite his previous refusal, can and will decide a constitutional challenge to the motor vehicle use tax and that

his decision will be subject to review in the courts of Vermont.

The *Williams* case presents a protracted saga of unsuccessful efforts by Vermont taxpayers to raise constitutional challenges to the motor vehicle use tax. Like the Barringers, Norman Williams purchased a car and paid sales tax in another state before moving to Vermont in 1981.[2] Williams filed suit in federal court under 42 U.S.C. § 1983 to enjoin enforcement of the Vermont use tax. The suit was dismissed under the Tax Injunction Act and Williams dutifully sought relief from the Department of Motor Vehicles.

He paid the motor vehicle use tax and requested that the state grant him a refund under section 8914. The Commissioner denied the refund because, as stated in *Westover,* 149 Vt. at 359, 543 A.2d at 700, the Vermont Constitution's separation of powers requires that "the power to decide constitutional issues [be] vested in the courts." Williams proceeded to state superior court where he filed an action under 42 U.S.C. § 1983. He alleged that because the use tax did not apply to individuals who were Vermont residents at the time that they purchased their cars in another state, it violated the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. The superior court held that the statute was constitutional and granted the state's motion to dismiss.

Williams appealed to the Vermont Supreme Court, which affirmed on the basis of its opinion in *Leverson v.*

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[2] In addition to representing himself *pro se* in *Williams,* Norman Williams represents appellants in the current action.

Conway, 144 Vt. 523, 481 A.2d 1029 (1984). In *Leverson*, the Vermont Supreme Court had rejected both a commerce clause challenge and an equal protection clause challenge to the use tax by new residents of Vermont.

Williams then appealed to the United States Supreme Court, which reversed and remanded the case to the Vermont Supreme Court. The United States Supreme Court held that when the Vermont statute was "viewed on its face, [Williams had] stated a claim of unconstitutional discrimination." 472 U.S. 14, 28 (1985). The Court confined its decision to the equal protection claim and declined to consider the commerce clause challenge, noting that "[w]e again put to one side the question whether a State must in all circumstances credit sales or use taxes paid to another State against its own use tax." *Id.*

On remand, the Vermont Supreme Court sent the case back to the superior court. For the first time, the state raised the defense of sovereign immunity, and the superior court held that a suit for refund of the use tax was barred by sovereign immunity. The court also held that Williams was not entitled to declaratory relief because the equal protection issue was moot in light of a 1986 regulation adopted by the Department of Motor Vehicles in response to the United States Supreme Court's 1985 decision.[3]

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[3] The new regulation, issued by the Department of Motor Vehicles in 1986, sought to rectify the equal protection problem by denying a Vermont use tax credit to Vermont residents who both purchase and register their cars in other states.

Williams appealed to the Vermont Supreme Court, which affirmed the dismissal of the complaint but vacated the superior courts' ruling on declaratory relief. *Williams v. State*, 156 Vt. 42, 589 A.2d 840 (1990), *reh'g denied*, 156 Vt. 42, 589 A.2d 840, *cert. denied*, 112 S. Ct. 81, and *cert. denied*, 112 S. Ct. 590 (1991). The Vermont Supreme Court held that the state's assertion of sovereign immunity did not violate taxpayers' due process rights because section 8914 provides an administrative procedure to decide their claims. *Id.* at 847. The court also held that since the taxpayers wanted a refund of the tax and the superior court lacked jurisdiction to award a refund without a waiver of sovereign immunity, a declaratory judgment would be merely advisory and the courts of Vermont are not empowered to render advisory opinions for the sole purpose of aiding the resolution of a dispute that belongs in another tribunal. *Id.* at 850. The court noted that, in any event, there was no justiciable controversy because the taxpayers were unlikely again to move to another state, purchase a car, and move back to Vermont. *Id.* at 851.

The Commissioner argues that the Vermont Supreme Court's opinion in the *Williams* case confirmed his jurisdiction pursuant to section 8914 to hear the Barringers' constitutional claim. (Brief of Appellee at 3.) But, the following statement in *Williams* casts serious doubt on that position:

> Prior to the United States Supreme Court's decision [in *Williams*], the remedy provided by § 8914 was not available to Williams and Levine to the extent they challenged the facial validity of § 8903, because the Commissioner of Motor

> Vehicles is not authorized to rule upon the constitutionality of the *statutes* he is bound to administer. [citation omitted] Nevertheless, after the Supreme Court's ruling that the use tax statute is facially unconstitutional, a complaint to the Commissioner under § 8914 would not have been futile. The Commissioner at that point would not have been required to address the constitutionality of the statute, for that question had been decided.

Williams, 589 A.2d at 847 (emphasis in original). After the Vermont Supreme Court's decision in *Williams*, the Commissioner may have the power to decide whether his department's manner of administering a tax statute is unconstitutional, but apparently he remains devoid of power to consider the Barringers' claim that the tax statute itself is facially unconstitutional. The Vermont Supreme Court's decision in *Williams* rests on the premise that the Commissioner would not be required to address the constitutionality of the statute because the case had been remanded from the United States Supreme Court which had already held the motor vehicle use tax facially invalid under the Equal Protection Clause. The United States Supreme Court, however, has never passed on the validity of the Vermont motor vehicle use tax under the Commerce Clause. Therefore, the Barringers would present the Commissioner with a Commerce Clause challenge to the facial validity of the use tax, a question which has not been decided and upon which the Commissioner apparently is not authorized to rule according to the *Williams* court.

Alexander v. Town of Barton, cited by the *Williams* court and by the Commissioner, confirms that Vermont

"administrative agencies have no power to determine the constitutional validity of statutes." 152 Vt. 148, 151, 565 A.2d 1294, 1296 (1989). In *Alexander,* the court held that the State Board of Appraisers was authorized to decide whether a town's property reappraisal methods complied with the Vermont Constitution. The *Alexander* court carefully distinguished the case before it by noting that "[t]his case . . . put the [administrative agency] in the position of judging the constitutionality of a listing practice pursuant to a statute, 32 V.S.A. § 4467, that specifically requires the [administrative agency] to 'take into account' the applicable provisions of the United States and Vermont Constitution[s]." *Id.*

The Barringers do not challenge a practice pursuant to a statute; they challenge the constitutionality of the statute itself. In addition, unlike the statute which "specifically commanded" the Board of Appraisers to consider the United States Constitution, the Vermont motor vehicle tax refund provision, Vt. Stat. Ann. tit. 32, § 8914, neither commands nor grants the commissioner authority to take into account the United States Constitution. Thus, *Williams* and *Alexander* do not dispel uncertainty concerning the adequacy of section 8914 as a remedy for the Barringers' challenge to the validity of the motor vehicle use tax.

In addition to uncertainty about whether the Commissioner can consider the Barringers' constitutional challenge, the availability of judicial review of a section 8914 hearing is also in doubt. To be plain, speedy and efficient, a state remedy must not only provide a full hearing, it must furnish a judicial determination. *See Hillsborough,* 326 U.S. at 625-26 (remedy not adequate

where judicial review of administrative hearing was purely discretionary by writ of certiorari). Even if the Commissioner were to grant the Barringers a hearing of their tax refund request, this would not, under Vermont law, assure judicial review of the administrative determination. The Vermont Administrative Procedure Act provides that "[a] person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the [Vermont] supreme court." Vt. Stat. Ann. tit. 3, § 815(a) (1985). A "contested case" is "a proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." Vt. Stat. Ann. tit. 3, § 801(b)(2) (1985). Thus, unless a hearing is required by either a statutory scheme or agency regulations, there is no right to judicial review, even if an administrative decision is rendered. *See Reed v. Department of Pub. Safety,* 137 Vt. 9, 398 A.2d 301 (1979) (no hearing required and therefore no right of judicial review of Department of Public Safety employee grievances); *Fitzpatrick v. Vermont State Retirement Sys.,* 136 Vt. 510, 394 A.2d 1138 (1978) (no hearing required and therefore no right of review of administrative decision not to credit retirement account).

The Commissioner argues that the Vermont Supreme Court's interpretation in *Williams* of the United States Supreme Court's holding in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), establishes that he is required by law to grant the Barringers a hearing on a refund claim. The *Williams* court acknowledged that *McKessen* overruled a portion of the Vermont

Supreme Court's opinion in *American Trucking Associations v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986). In *American Trucking*, the Vermont Supreme Court had held that sovereign immunity barred a refund of a state fee that the court expressly recognized had been collected in violation of the Commerce Clause of the United States Constitution. Four years after the *American Trucking* decision, in *McKesson*, the United States Supreme Court held that "if a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." 496 U.S. at 22. In *Williams*, the court hold that *McKesson* requires Vermont to waive sovereign immunity in some respect so as to provide a remedy to permit recoupment of unconstitutionally exacted taxes. *Williams*, 589 A.2d at 848. However, the court carefully noted that even after *McKesson*, a state "may choose, and limit, the remedy, so long as it comports with due process principles." *Id.* at 849. The *Williams* court concluded that Vermont has complied with *McKesson* by providing the section 8914 administrative refund procedure, but still has not, and need not, waive sovereign immunity in a plenary suit for a refund.

The Commissioner argues that if a hearing pursuant to section 8914 is required by the United States Constitution, it is a "contested proceeding," and, under the Vermont Administrative Procedure Act, may be appealed directly to the Vermont Supreme Court.

We remain troubled by the lack of assurance that the Barringers will obtain judicial review in Vermont courts. The Commissioner cites one case in which the Vermont Supreme Court reviewed his final determination in a tax assessment action. *See In re Kelsot*, 152 Vt. 579, 568 A.2d 378 (1989). However, he does not point to any instance in which the Vermont Supreme Court has reviewed his determination in a tax refund action based upon a constitutional claim. Nor does he cite any authority to establish that a tax refund hearing required by due process would be a "contested case" within the meaning of Vt. Stat. Ann. tit. 3, § 801(b)(2).

Moreover, even if the Vermont courts would review the Commissioner's administrative decision, it is not clear that the scope of this judicial review would satisfy the requirements of the Tax Injunction Act. Because the Commissioner apparently cannot consider the constitutional validity of the tax statute, judicial review of his decision may be limited to the matters actually decided which would not afford full protection to the Barringers' constitutional rights.

Like Sisyphus, Vermont taxpayers have labored to bring their constitutional claims to the pinnacle of judicial review, only to be turned away from the Vermont courts when a disposition of the claims seemed near. A careful reading of the opinion in *Williams* leaves the reader with the uneasy feeling that if there is a judicial remedy available to the Barringers in Vermont, it cannot fairly be said to be plain.

Accordingly, the Tax Injunction Act does not bar a federal district court from exercising jurisdiction over this

action. The order dismissing the complaint is vacated and the case is remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Greg R. Barringer and Judith M. Barringer, Plaintiffs,	:	Civil Action File No. 91-231
v.	:	
Michael D. Griffes, Defendant.	:	

FINDINGS OF FACT, OPINION AND ORDER

(Filed Sept. 2, 1992)

In 1988, plaintiffs, then Connecticut residents, purchased a 1988 Mazda automobile, registered it in Connecticut, and paid the state sales tax of 7.5 percent of the car's value. In 1990, plaintiffs moved to Vermont, bringing the Mazda with them. To register the vehicle in Vermont, as they wish to do, they are required by Vermont law to pay a use tax of five percent of the vehicle's cost.[1] Plaintiffs have refused to pay the tax, claiming that it violates the Commerce Clause of the United States Constitution. On August 27, 1991, they brought suit under 42 U.S.C. § 1983 seeking a declaration that Vermont's motor vehicle use tax is unconstitutional and a preliminary and permanent injunction restraining defendant, the Vermont Commissioner of Motor Vehicles, from enforcing the statute.

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[1] See 32 V.S.A. § 8903, discussed in Part I of this Opinion, *infra*.

This court initially found that it lacked jurisdiction over the matter by virtue of the Tax Injunction Act, 28 U.S.C. § 1341. *Barringer v. Griffes*, Civ. No. 91-231 (D. Vt. Sept. 4, 1991). On May 18, 1992, that decision was vacated by the Second Circuit Court of Appeals on the ground that the Tax Injunction Act did not divest the federal court of jurisdiction in this case because the judicial remedy available to plaintiffs in Vermont state courts "cannot fairly be said to be plain." *Barringer v. Griffes*, No. 91-7902 (2d Cir. May 18, 1992), at 3860. The matter was accordingly remanded and defendant subsequently filed its answer.

A hearing on plaintiff's motion for preliminary injunction was held on August 14, 1992, at which the court heard testimony of Judith Barringer and Greg Barringer as well as arguments of counsel on the issues raised by both the motion for preliminary injunction and the merits of the action. The parties agreed no further evidence or discovery was needed and the motion accordingly was consolidated with a trial on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure.[2]

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[2] At the close of the hearing, and by written motion filed subsequently, plaintiffs sought to amend their complaint, Fed. R. Civ. P. 15(a), to add a claim under the Privileges and Immunities Clauses of Article IV, § 2 and the Fourteenth Amendment of the Constitution. In the court's view, this attempt to add a new theory of relief comes too late, in light of plaintiffs' otherwise urgent desire to obtain immediate relief, defendant's willingness to consolidate the preliminary and merits hearings, and the readiness of the Commerce Clause issues for decision. See *State Trading Corp. of India v. Assuranceforeningen Skuld*, 921 F.2d 409, 417-18 (2d Cir. 1990). The motion is therefore DENIED.

I.

The statutory scheme is set forth in 32 V.S.A. Ch. 219. Anyone who registers a car in Vermont must pay a one-time purchase or use tax on the vehicle. 32 V.S.A. § 8903.[3] A nonresident who merely buys but does not register a vehicle in Vermont is not subject to the tax. The tax is imposed on cars purchased and registered in Vermont (the purchase tax) as well as cars that have been purchased and registered in other states prior to registration in Vermont (the use tax). § 8903(a), (b). However, a Vermont resident who buys a car in another state, without

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[3] § 8903(a) imposes "upon the purchase in Vermont of a motor vehicle by a resident a tax. . . . " § 8903(b) imposes "upon the use within this state a tax . . . except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid. . . . " § 8903(c) provides that "[t]he Vermont registration or transfer of Vermont registration of a motor vehicle shall be conclusive evidence that the purchase and use tax applies except as provided in section 8911 of this title [specifying certain classes of vehicles exempt from the tax]." § 8905 requires payment of the tax "at the time of first registering or transferring a registration." Read together, these sections impose the purchase or use tax upon anyone registering a car in the state, except those excluded under § 8911.

§ 8903 was amended by the Vermont legislature, effective July 1, 1991, to raise the tax rate from four percent to five percent of the vehicle's cost. 1991 Vt. Laws No. 73. Unfortunately, the editorial comments in Title 32 of Vermont Statutes Annotated § 8903 (1991) appear to state incorrectly that the amendment takes effect only on July 1, 1993. This confusion may stem from the fact that Public Act No. 73, § 2, provides: "Effective July 1, 1993, the rate of the motor vehicle purchase and use tax shall revert to four percent unless the increase in the rate of this tax, enacted herein, is further extended by act of the general assembly." 1991 Vt. Laws No. 73, § 2.

registering it there (or in a third state) before bringing it back to Vermont, may receive a credit against the Vermont use tax for any purchase or use tax paid to the other state if that state would afford a credit for taxes paid to Vermont in similar circumstances. § 8911(9);[4] *Williams v. State*, 156 Vt. 42, 46 n.3, 4589 A.2d 840 (1990), *cert. denied*, 112 S.Ct. 81; 112 S.Ct. 590 (1991). The credit is not available to those (like plaintiffs) who are not residents of Vermont at the time a vehicle is purchased; nor is it available to Vermont residents who first register a vehicle in another state before registering it in Vermont.[5]

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[4] That section provides in part:

> The tax imposed by this chapter shall not apply to:
>
> . . .
>
> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, provided that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference.

[5] It is not clear from the record before the court what circumstances would compel a Vermont resident to register a pleasure car in another state. In Vermont, only residents are required to register pleasure cars in the state. 23 V.S.A. § 301. If that provision is uniform throughout the Union, a Vermont resident living temporarily in another state would likely not be inclined to register a car in that state. The dissenters in *Williams v. Vermont*, 472 U.S 14 (1985), which held the motor vehicle purchase and use tax statute facially discriminatory, labelled such a person a "phantom beneficiary" of the § 8911(9) exemption. *Id.* at 31 (Blackmun, J., dissenting).

The equal protection problem addressed in *Williams v. Vermont* is that § 8911(9) on its face provides a credit to any Vermont resident who purchases a car in a reciprocating state and

The gravamen of plaintiffs' complaint is that the credit provided in § 8911(9) is not available to them. The State of Vermont imposes a cost on the Barringers for moving to Vermont with a used car: they must pay a second tax upon registering the Mazda in Vermont. From this undisputed factual premise, plaintiffs argue that the tax violates the Commerce Clause because it creates an impermissible incentive for people moving to Vermont to purchase their vehicles in Vermont. They contend further that the tax is not "fairly apportioned" and exposes interstate commerce to multiple burdens not borne by local commerce. With these propositions I disagree.

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subsequently registers it in Vermont, regardless whether he or she first registered the car elsewhere. The plaintiffs in *Williams*, like the Barringers, had registered cars in other states prior to moving to Vermont, but were ineligible for the credit. The Supreme Court held that the scheme arbitrarily favors Vermont residents who purchase and register cars elsewhere over similarly situated nonresidents. *Id.* at 22-24. A regulation subsequently promulgated by the Commissioner limits the availability of the § 8911(9) credit to Vermont residents who have not previously registered the vehicle in the state where it was acquired or in any other state, thus imposing identical burdens on Vermont residents similarly situated to the *Williams* plaintiffs and thereby curing the constitutional defect identified by the Court. See Agency of Transportation, Department of Motor Vehicles, Rule 86-28-E(1)(d) ("Motor Vehicle Purchase and Use Tax") (July, 5, 1986); *Williams v. State*, 156 Vt. at 46 n.3. In the present matter, of course, I am constrained to construe § 8911(9) in accordance with Rule 86-28-E and as recognized by the Vermont Supreme Court in *Williams v. State*.

II.

Article I, section 8 of the Constitution vests in the federal Congress the power "[t]o regulate commerce . . . among the several States." The issue presented here is the scope of what is often called the "dormant Commerce Clause"; that is, whether an exercise of state taxing authority contravenes the negative implications of the constitutional grant of power to Congress to regulate commerce. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1911 (1992). "It long has been established that the Commerce Clause of its own force protects free trade among the States. One aspect of this protection is that a State 'may not discriminate between transactions on the basis of some interstate element.' That is, a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984) (quoting *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977); other citations omitted). Merely because an activity affects or is affected by interstate commerce, however, does not by itself foreclose a state's power to tax that activity. See *Allied-Signal, Inc. v. Director, Division of Taxation*, 112 S.Ct. 2251, 2258 (1992).

In *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988), the Supreme Court reiterated the "four-part formulation . . . used to evaluate the validity of state taxes vis-a-vis the Commerce Clause": A state tax does not offend the Constitution if it (1) is applied to an activity that has a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to benefits

provided by the state. 486 U.S. at 30; see *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 287 (1977).

Vermont's motor vehicle use tax unquestionably satisfies the first and fourth criteria (and plaintiffs do not contend otherwise): the tax is imposed when a person seeks to register and drive a car in Vermont, and it funds services provided by Vermont – the maintenance and improvement of the state's highways, 32 V.S.A. § 8901 – which make driving in the state possible and pleasurable. Plaintiffs challenge the tax as failing to satisfy the second and third criteria: fair apportionment and discrimination against interstate commerce.

The fair apportionment issue is not troubling as it is largely irrelevant in the present context. Among "the basic principles for state taxation of the income of a business operating in interstate commerce . . . [is] that 'the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs.' " *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 219 (1980) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 460 (1959)); see *Allied-Signal, Inc. v. Director, Division of Taxation*, 112 S.Ct. at 2258-59. Vermont's motor vehicle purchase and use tax does not tax interstate activity at all. The tax, calculated as a percentage of the "taxable cost" or depreciated value of the vehicle at the time of registration in Vermont, is on the use of the car in Vermont only, not in any other state. There is no comparison, for example, to *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 311-12 (1938), principally relied upon by plaintiffs, where the Court struck

down Indiana's gross receipts tax on fair apportionment grounds because the tax was imposed on income from the sale of goods both in state and out of state. Indiana taxed local manufacturers' sales receipts from both local and interstate sales without apportionment; Vermont taxes only the local use of automobiles. No apportionment is needed.

Plaintiffs contend, however, that in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, the Supreme Court made it "clear that a tax credit for taxes paid in other states is constitutionally required for sales and use taxes." Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, at 6. In that case, applying the four-part test noted above, the Court upheld the imposition of Louisiana's use tax on a Louisiana corporation's distribution to Louisiana customers of catalogs designed and printed out of state. Addressing the apportionment requirement, the Court stated that "[t]he Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States." *Id.* at 31. Because of credit, there could be no danger of two or more states taxing the same interstate activity – the shipping of catalogs from one state to customers in another – without a fair apportionment of the income generated by such activity. Plaintiffs seek to draw an analogy between the catalogs in *D.H. Holmes* and their 1988 Mazda, but any resemblance is deceptive. Although the tax in *D.H. Holmes* is denominated a "use" tax, the Court was careful to note that Louisiana assessed the tax on "the *distribution* of the catalogs" rather than on "the mere presence of goods within the State," *id.* at 31

(emphasis in original), and that the trial court had "determined that the distribution of the catalogs in Louisiana was 'intended for the use of D.H. Holmes in increasing its sales to potential customers who are residents of Louisiana.' " *Id.* at 28 (quoting Louisiana Civil District Court ruling). In the present case, by contrast, plaintiffs are subject to a tax only for the use of their car within Vermont, not for its distribution or importation from another state to customers in state, and the car is not intended to generate income in a business enterprise. Plaintiffs have simply not engaged in any interstate commerce in need of fair apportionment.

The more significant question is whether the use tax is discriminatory in the relevant sense. Pinning a definition on the term is difficult as its meaning has shifted with the evolution of the Supreme Court's doctrine over the decades. See *Quill Corp. v. North Dakota*, 112 S.Ct. at 1911-12. It is probably an understatement to say that the Court's dormant Commerce Clause jurisprudence, particularly as it relates to limits on state taxation powers, in unpredictable. See, e.g., *id.* at 1915 (acknowledging that Court's "law in this area is something of a 'quagmire' "); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 259-60 (1987) (Scalia, J. dissenting) (questioning historical and theoretical foundations of doctrine: "The fact is that in the 114 years since the doctrine of the negative Commerce Clause was formally adopted as holding of this Court . . . our applications of the doctrine have not to put too fine a point on the matter, made no sense."). Yet, even in its most expansive

application of the doctrine, the Court has never invalidated a state tax scheme sharing the relevant features of Vermont's motor vehicle purchase and use tax.

The Court has long held that a use tax does not violate the Commerce Clause merely because it is imposed on goods imported from other states. See *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582-83 (1937). The question raised here is whether the fact that a sales or use tax was imposed on the property by another jurisdiction prior to its importation into Vermont, with no credit being given against the use tax, renders the tax unconstitutional. On occasion the Court has cited the availability of a credit against a use tax for sales taxes previously paid as a factor supporting the constitutionality of the tax. See, e.g., *D.H. Holmes Co.*, 486 U.S. at 31. But the issue of the necessity of such a credit has not been decided. Indeed, in 1985 the Court noted that it "has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax." *Williams v. Vermont*, 472 U.S. 14, 21-22 (1985) (citing *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172 (1939)).

Whatever reasons of sound policy might support the credit sought by plaintiffs, this court is not persuaded that the credit is mandated by the Commerce Clause. The Supreme Court has not only "been reluctant to interfere with legislative policy decisions in this area," *id.* at 22; it has also been reluctant to compel states, in enacting their own tax laws, to examine "the tax burdens imposed by other States." *Tyler Pipe Industries*, 483 U.S. at 247. Thus, although *Southern Pacific Co. v. Gallagher* did not decide the precise issue of the necessity for crediting a foreign tax paid, as that question did not arise "by evidence,

finding or assignment of error," 306 U.S. 167, 172 (1939), the Court nevertheless upheld a California use tax which made no provision for credit for taxes already paid to foreign states, noting that "California's exaction for the distribution of tangible personal property is the same, whether purchased within or without her borders. . . . " *Id.* See also *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76 (1963) (Brennan, J., concurring) (states have not duty "to ensure absolute equality of economic burden as between sales and use taxpayers"; court has sustained tax schemes even where "as a matter of economic fact the out-of-state use taxpayer is likely ultimately to incur a heavier burden than his in-state counterpart, the sales taxpayer"). " 'The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment.' " *Armco Inc. v. Hardesty*, 467 U.S. at 645 n.8 (quoting *Freeman v. Hewit*, 329 U.S. 249, 256 (1946)).[6]

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[6] By the same token, where a state tax facially discriminates between in-state and out-of-state enterprises, the state is not permitted to justify the tax by showing that, when viewed in conjunction with another state's tax scheme, the tax is fair. In *Armco Inc. v. Hardesty*, for example, the Court struck down West Virginia's wholesale receipts tax which was imposed on out-of-state manufacturers who sold in West Virginia but exempted local manufacturers, even though the local manufacturers were subject to a much higher manufacturing tax imposed by the state. 467 U.S. at 642-43. One ground for invalidating the tax was that Ohio (whence Armco hailed) or any other state might impose a manufacturing tax comparable to West Virginia's: "then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in

The fact that plaintiffs are required to pay a second tax on the same automobile in order register it in Vermont is insufficient by itself to show that the tax interferes with or discriminates against interstate commerce. In all the cases cited by plaintiffs, more must be shown. Thus, Vermont's use tax would be unconstitutional, if it imposed without sufficient justification[7] a burden on interstate enterprises greater than the burden imposed on local business operations. See, e.g., *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009, 2013-14 (1992) (invalidating Alabama's hazardous waste disposal fee on wastes generated outside state and disposed in state, which did not apply to wastes generated within state); *Tyler Pipe Industries*, 483 U.S. at 253 (invalidating Washington's manufacturing tax on locally made products sold to out-of-state customers which exempted locally made products sold to local customers); *Armco Inc. v. Hardesty*, 467 U.S. at 642 (invalidating West Virginia's wholesale

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West Virginia will pay only the manufacturing tax." *Id.* at 644. The Court stated that a rule requiring Armco "to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia . . . is not the test." *Id.* The constitutionality of the challenged tax cannot "depend on the shifting complexities of the tax codes of 49 other States." *Id.* at 645.

[7] Even where a plaintiff can establish that a state tax discriminates against interstate commerce, the state may "show that 'the *discrimination* is demonstrably justified by a valid factor unrelated to economic protectionism.' " *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009, 2015 (1992) (quoting *Wyoming v. Oklahoma*, 112 S.Ct. 789, 801 (1992)) (emphasis in *Chemical Waste*). The state in the present case is not put to this test as the plaintiffs have failed to meet their initial burden.

gross receipts tax which exempted local manufacturers, even though local manufacturers paid a higher manufacturing tax); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 331 (1977) (invalidating New York transfer tax on securities transactions which taxed transactions involving out-of-state sale more heavily than those involving in-state sale); *Halliburton Oil Well*, 373 U.S. at 67, 71-73 (Louisiana use tax collected only on local consumption of goods purchased outside taxing state violates Commerce Clause in the absence of adequate justification where no complementary sales tax is imposed on equivalent locally sold goods).

The motor vehicle use tax does not impose such discriminatory burdens. To the contrary, Vermont imposes the *same* tax on using a car in this state (or, more precisely, it employees the same formula for calculating the tax) whether the car is purchased here or elsewhere. The only arguably relevant exception is that the state permits a credit to the Vermont resident who already paid a sales or use tax on the vehicle in a reciprocating state without having registered it there. § 8911(9).[8] The primary purpose of the exemption, however, is to remove the disincentive for Vermonters to buy cars out of state, thus *encouraging* interstate commerce. That purpose

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[8] "Since all States apparently forgo payment of their sales tax by out-of-state purchasers of automobiles, see *J.C. Penney Co. v. Hardesty*, 164 W.Va. 525, 538-539, 264 S.E.2d 604, 613 (1980), § 8911(9) might well be entirely superfluous, as no out-of-state purchaser will ever be required to pay a sales tax which could be credited against Vermont's use tax pursuant to § 8911(9)." *Williams v. Vermont*, 472 U.S. at 36 n.5 (Blackmun, J., dissenting).

would not, of course, be served by exempting persons like plaintiffs who are not Vermont residents at the time of purchase. "[T]he credit facilitates the interstate purchase of automobiles, and helps ensure that a car buyer is not paying for the use of two States' roads when using only one." *Williams v. Vermont*, 472 U.S. at 30 (Blackmun, J., dissenting). "A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power." *Henneford*, 300 U.S. at 587.

Plaintiffs also assert that the motor vehicle tax provides an unconstitutional incentive for nonresidents moving to Vermont to defer buying a car until they arrive in Vermont. They claim that "this system influences purchasing decisions in favor of Vermont businesses." Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, at 10. The tax can create an incentive to defer buying a car until after completing a move to Vermont, but it does *not* necessarily create an incentive to buy the car in Vermont. In virtually all instances, upon assuming residency in Vermont, a person is burdened the same no matter where the car is purchased, paying the Vermont purchase tax upon buying and registering a car in Vermont, the Vermont use tax after buying a car in another state which did not collect a sales tax, or no tax to Vermont after buying a car in a reciprocating state which did collect an equivalent tax.[9] As a practical matter, a

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[9] In theory, the system would require payment of the use tax by a Vermonter who purchases a car in a *non*reciprocating state which *does* levy a sales tax on out-of-state purchasers. A person contemplating such a purchase would have an incentive

person may be more included to purchase a car within the state after moving here, but that is a consequence of the conveniences of buying near one's residence, not of Vermont's tax system.

The tax scheme also may provide an incentive to a Vermont resident who purchases a vehicle in a reciprocating state with the intention of bringing it back to Vermont to not first register the vehicle in the other state.[10] With foresight, the Vermonter would want to forego the foreign-state registration so as to remain eligible for the § 8911(9) credit. That incentive is not present for a person like the plaintiffs, who purchases a car in another state prior to obtaining Vermont residency. Nonresidents may not take the credit provided in § 8911(9).[11] But it bears

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to buy the car in Vermont in order to avoid paying two taxes. Plaintiffs have not argued (and it is doubtful they have standing to do so) that this incentive renders the use tax infirm under the Commerce Clause. In any event, the record is entirely insufficient to support a conclusion that such an incentive, which follows logically from the structure of Vermont's tax scheme if never in practice, imposes any burden on interstate commerce. The Supreme Court this term noted that its recent cases have "emphasized the importance of looking past 'the formal language of the tax statute [to] its practical effect.' " *Quill Corp. v. North Dakota*, 112 S.Ct. at 1912 (quoting *Complete Auto*, 430 U.S. at 279).

[10] Again, this incentive may exist more in theory than practice. See note 5, *supra*.

[11] The court states no view as to whether the disparate status accorded residents and nonresidents who buy cars in other states without registering them there prior to registering them in Vermont – only the former are entitled to the credit – comports with the Equal Protection Clause of the Fourteenth Amendment. See *Williams v. Vermont*, 472 U.S. at 19 n.4

repeating that the tax scheme does not generally provide an incentive to *purchase* a vehicle in Vermont rather than in other states – and thus, contrary to plaintiffs' assertions, does not favor local commercial interests at the expense of foreign-state or interstate interests. The incentive relates only to the registration of vehicles: residents may get a credit if they buy a car out of state only if they do not first register the car out of state.

The court concludes that Vermont's motor vehicle purchase and use tax, on its face and as applied to plaintiffs, does not offend the Commerce Clause of the United States Constitution. Accordingly, plaintiffs' request for declaratory and injunctive relief is DENIED and judgment is entered for defendant.

Dated at Burlington, in the District of Vermont, this 2 day of September, 1992.

/s/ Fred I. Parker
Fred I. Parker
Chief Judge

(identifying but not reaching identical issue). Plaintiffs have not asserted this claim and they have no standing to do so, since they registered their vehicle in Connecticut prior to moving to Vermont. As noted above, *supra* note 5, the Supreme Court's concern in *Williams v. Vermont* related to the statute's facially disparate treatment of residents and nonresidents who *registered* cars elsewhere prior to registering them in Vermont. 472 U.S. 14.

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 857 – August Term 1992
(Argued February 10, 1993 Decided 8-9-1993)
Docket No. 92-9062

GREG R. BARRINGER and JUDITH M. BARRINGER,

Plaintiffs-Appellants,

v.

MICHAEL D. GRIFFES,

Defendant-Appellee.

Before:

VAN GRAAFEILAND, KEARSE and CARDAMONE
Circuit Judges

Greg and Judith Barringer appeal from a final judgment entered on September 2, 1992 in the United States District Court for the District of Vermont (Parker, C.J.) that 1) denied their request for declaratory and injunctive relief on their claim that the Vermont Motor Vehicle Purchase and Use Tax, Vt. Stat. Ann. tit. 32, ch. 219 (1981), violates the Commerce Clause of the United States Constitution, and 2) refused to grant them leave to amend their complaint to include a claim based on the Privileges and Immunities Clause.

Reversed.

Judge Van Graafeiland dissents in a separate opinion.

NORMAN WILLIAMS, Burlington, Vermont (Gravel and Shea, Burlington, Vermont; Jerome F. O'Neill, O'Neill and Crawford, Burlington, Vermont, of counsel), *for Appellants.*

WILLIAM E. GRIFFIN, Assistant Attorney General for the State of Vermont, Montpelier, Vermont (Jeffrey L. Amestoy, Attorney General for the State of Vermont, Montpelier, Vermont, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge*:

Appellants on this appeal wanted to register and operate an automobile in Vermont that they had purchased in another state. Vermont's motor vehicle tax scheme imposes a use tax on automobiles; at the same time it grants a credit against the use tax for any sales tax paid to Vermont. Due to the credit, most Vermonters never have to pay the use tax. Non-residents moving to Vermont find themselves in quite a different situation. They are not credited against the use tax for any sales tax they paid in their former state of residence. Instead, they might pay a sales tax in the state where they previously lived and, in addition, Vermont's use tax. We are asked to decide whether Vermont's attempt to tax the use of an automobile brought from Connecticut, where a sales tax was paid on it, places such a burden on interstate commerce as to render Vermont's use tax invalid as in contravention of the Commerce Clause.

Whenever a court sets sail into the sea of the Interstate Commerce Clause, it should mind which way the wind blows. It was early believed that the Commerce Clause, by its own force, limited the state's authority to

tax commerce. Later it was thought the Clause only granted Congress authority to pass legislation in this field, and that the function of the Supreme Court was limited to invalidating state laws contrary to congressional enactments. *See* Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 41 (1987) [Hellerstein, *State Taxation*]. Dealing with these competing approaches took the Supreme Court along one tack until in *Cooley v. Board of Wardens*, 53 U.S. (12 HOW.) 298 (1851), it came about, and began a different tack. There it ruled that those aspects of commerce inherently national in character were subject to Congress' single, uniform law; those aspects of commerce that were local in character, demanding diverse approaches, were left to the states to legislate. *Id.* at 319.

Carried along by these changing winds of doctrine, the Supreme Court then resolved Commerce Clause cases by drawing various distinctions. In different periods, for example, the Court has examined the "national" or "local" nature of a state's tax, whether a state enacted a "direct" or "indirect" tax on interstate commerce, whether a state tax discriminated against interstate commerce in its practical operation, and whether the state tax simply made interstate commerce pay its fair share of the costs of state government or whether it exacted more than its fair share. These analytical tools were among those used to determine the constitutionality of a state tax on interstate transactions. The changes in direction evolving from the emphasis accorded these varying doctrines make plain that to set our sails safely for a favoring

breeze in this sea, it is necessary to hug the shore closely, where the wind stands fair.

Plaintiffs, Greg and Judith Barringer, appeal from a judgment entered on September 2, 1992 in the District Court for the District of Vermont by Chief Judge Fred I. Parker. Judge Parker denied their request for declaratory and injunctive relief based on their claim that the Vermont Motor Vehicle Purchase and Use Tax, Vt. Stat. Ann. tit. 32, ch. 219 (1981 and Supp. 1992), violates the Commerce Clause of the United States Constitution. *See Barringer v. Griffes*, 801 F. Supp. 1282, 1289 (D. Vt. 1992). The district court also refused to grant the Barringers leave to amend their complaint to include a claim based on the Privileges and Immunities Clause. *See id.* at 1284 n.2. Because we hold the Vermont use tax violates the Commerce Clause we need not reach or decide the refusal to permit plaintiffs to amend their complaint to include the latter claim.

BACKGROUND

The Barringers purchased a 1988 Mazda 626 LT for $14,769 from Partyka Chevrolet in Hamden, Connecticut on September 23, 1988. They were then Connecticut residents and, in compliance with Connecticut law, they paid an approximately 7.5 percent sales tax based on the price of the vehicle, and registered it in that state. The Connecticut sales tax cost them approximately $1,085.

A little less than two years later, on August 25, 1990, the Barringers moved to Middlebury, Vermont to permit Ms. Barringer to take up an assistant professorship in

classical archaeology at Middlebury College. After arriving in their new home state they were told that under Vermont law they would have to pay a 4 percent use tax on the depreciated value of their automobile in order to register it there. (Vermont raised the use tax to 5 percent in 1991, though it will revert to 4 percent on July 1, 1993. *See* Vt. Stat. Ann. tit. 32, § 8903 (Supp. 1992.) The Barringers also learned that no credit would be granted them for the sales tax they had paid to the State of Connecticut. Because the automobile had a depreciated value of about $7,000, the Vermont 4 percent use tax amounted to $280. They found the total taxes they would pay on their car to both Connecticut and Vermont unacceptable.

In June 1991 plaintiffs therefore brought an action in Vermont Superior Court for declaratory and injunctive relief against the Vermont Motor Vehicle Commissioner, Michael Griffes, defendant-appellee. The Commissioner moved to dismiss the action for lack of subject matter jurisdiction on the grounds that the Barringers had to pay the tax and then seek an administrative refund from the Commissioner. The Barringers withdrew their state complaint and filed in its place on August 27, 1991 the instant federal action seeking the same declaratory and injunctive relief. Plaintiffs claimed that the Vermont tax violated the Commerce Clause of the United States Constitution because it did not grant them a credit for the sales tax they had paid on their Mazda in Connecticut.

The district court dismissed the action as soon as it was filed on the grounds that the case was barred by the Tax Injunction Act, 28 U.S.C. § 1341. On appeal we vacated the dismissal order and remanded the case to the district court, for further proceedings. *See Barringer v.*

Griffes, 964 F.2d 1278, 1284 (2d Cir. 1992). On remand the district court held a hearing on plaintiffs' motion for a preliminary injunction, and at the hearing's close suggested consolidating the preliminary and permanent injunction phases of the case, to which both parties agreed. The motion for a preliminary injunction was thereafter consolidated with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). The Barringers also informed the trial judge that they planned to assert an additional claim based on the Privileges and Immunities Clause, and filed a motion to amend that same day.

The district court issued an opinion and order on September 2, 1992, holding that the Vermont Motor Vehicle Purchase and Use Tax did not violate the Commerce Clause, and denying plaintiffs' motion to amend their complaint because it was made too late. *See Barringer*, 801 F. Supp. at 1284 n.2, 1289. This appeal followed.

DISCUSSION

I. Vermont Motor Vehicle and Purchase and Use Tax

We are aware that the issue of the constitutionality of a sales and use tax focuses on an unsettled question of law that the Supreme Court has explicitly declined to address. That Court once before actually considered the same Vermont vehicle tax at issue before us in the context of a different case, *Williams v. Vermont*, 472 U.S. 14 (1985). *Williams* held the statute facially violated the Equal Protection Clause to the extent that it granted a use tax credit to Vermont residents who purchased (illegible) registered vehicles outside of Vermont and thus paid sales taxes to another state, but did not grant the same credit to non-

residents in similar circumstances. *See id.* at 27; Vt. Stat. Ann., tit. 32, § 8911(9) (1981) (credit for Vermont residents purchasing out-of-state). Accordingly, the Supreme Court in *Williams* did not reach the Commerce Clause questions raised by the parties. *See* 472 U.S. at 27. Having decided the case on other grounds, the Court explicitly noted, "[w]e again put to one side the question whether a State must in all circumstances credit sales or use taxes paid to another State against its own use tax." *Id.* at 28.

In response to *Williams,* Vermont issued an administrative ruling narrowing its statute. Under the regulations restricting § 8911(9) to comply with *Williams,* the sales tax credit is no longer available for Vermont residents who buy and register their automobiles in other states before registering them in Vermont. *See* Vt. Agency of Transp., Dep't of Motor Vehicles, Rule 86-28-E (July 5, 1985) (but the rule still allows a credit for Vermonters who purchase but do not register a vehicle out-of-state).

The statute and regulations currently operate as follows: § 8903(a) of Title 32 of the Vermont Statutes Annotated imposes a sales tax on the purchase of motor vehicles in Vermont; § 8903(b) of Title 32 imposes a use tax on motor vehicles that is payable upon registration of the vehicle with the Vermont Department of Motor Vehicles. Section 8903(b) further grants a credit against the Vermont use tax for any § 8903(a) Vermont sales tax paid. While a credit is thus available for any §8903(a) sales tax paid to Vermont, no such credit is granted for a sales tax paid to any other state where the vehicle has been previously registered.

The administrative limitations adopted in response to *Williams* clarified this point and made apparent that no one, Vermonters or others, who purchases and registers a motor vehicle in another state will obtain the Vermont tax credit. Plaintiffs note, with some justification, that this administrative narrowing of the statute alters the practical effect of the tax scheme very little. There is virtually no reason why a Vermont resident would ever want to purchase and register a vehicle out-of-state before registering the same vehicle in-state.

Examining the history of these taxes, it is evident that sales taxes first came into being in the depression years of the 1930s. Use taxes were enacted to stem the loss of revenue to non-sales tax states from those individuals who might not have paid the sales tax. Use taxes are functionally equivalent to sales taxes. *See* Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 Tax Law. 405, 406-09 (1986) [Hellerstein, *Complementary Taxes*] (describing sales and use tax schemes). Typically a use tax, as the one before us, is levied upon the use, storage, or other consumption in the state of tangible personal property not already subjected to a sales tax. Vermont's automobile purchase and use taxes operate together with the avowed purpose of "improv[ing] and maintain[ing] the state and interstate highway systems." Vt. Stat. Ann. tit. 32, § 8901.

Here the State of Vermont designed its tax plans to grant a credit for taxes paid to Vermont so that a resident motorist either pays the sales tax or the use tax, but not both. Yet, under this system automobiles transported into the state become subject to a tax that is usually not levied on in-state vehicles; use taxes like Vermont's fall most

heavily on owners of out-of-state autos. *See* Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 159 n.112 (1988) [Hellerstein, *Internal Consistency*] (noting use taxes discriminate "on their face").

In order to appreciate fully whether Vermont's use tax contravenes the Commerce Clause, the state's legislation must be examined in the context of the sales *and* use taxes together since they represent complementary and compensating taxes designed to operate in tandem. In considering the two taxes together, we turn to the issue left open by *Williams* and now raised by the Barringers: whether Vermont's Motor Vehicle Purchase and Use Tax violates the Commerce Clause.

II The Supreme Court's Construction of the Commerce Clause

The sparse language of the Commerce Clause provides little guidance to its modern-day interpreters. That clause establishes simply that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Only in the late 19th century did the Supreme Court first unequivocally hold that the Commerce Clause by its own force limited the authority of the states to tax interstate commerce. *See Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 278-79 (1872); Hellerstein, *State Taxation, supra*, at 40. While the Court struggled for many years with the distinction

between valid and invalid state taxes, *see generally* Hellerstein, *State Taxation, supra,* at 43-48, in the mid-1930s it developed as a test for constitutionality the multiple taxation doctrine. *See id.* at 48-49.

The multiple taxation doctrine formed the basis for recent developments in Commerce Clause case law. In *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 258 (1938), a case credited with establishing multiple taxation as the touchstone of constitutionality, Justice Stone explained, "under constitutional limitations, [a taxing system] must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business." Those two concerns continued to surface in later cases, including the 1977 decision that initiated the four-part test now characterizing the current era of Commerce Clause jurisprudence.

The Supreme Court first laid out its current Commerce Clause test in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977), where it upheld a tax on the privilege of doing business in-state as applied to a corporation involved in interstate commerce. *Complete Auto* reiterated *Western Live Stock*'s acknowledgement that interstate commerce was not immune *per se* from state taxation. *Id.* at 288. In the years since *Complete Auto,* the Supreme Court has faithfully applied its test, *see* Hellerstein, *State Taxation, supra,* at 56; *accord, e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 617 (1981), though the test's components have been the subject of elaboration, refinement and some dispute.

The four factors comprising the *Complete Auto* test may be succinctly stated: 1) whether the activity taxed has a substantial nexus with the state; 2) whether the tax is fairly apportioned; 3) whether the tax discriminates against interstate commerce; and 4) whether it is fairly related to benefits provided by the State. *See* 430 U.S. at 279. The opposing parties in the case before us agree that *Complete Auto* provides the relevant framework governing disposition of this case and that the first and fourth factors are satisfied by the Vermont motor vehicle tax scheme. Accordingly, only the second and third factors – fair apportionment, and discrimination against interstate commerce – remain to be analyzed in order for us to adjudge the constitutionality of Vermont's tax.

III *Fair Apportionment*

Plaintiffs first insist the Vermont tax does not fairly apportion the tax burden. They complain that, during the useful life of a vehicle transported interstate, it will be taxed more than a vehicle that remains in-state.

Although the meaning of fair apportionment was not precisely defined by *Complete Auto*, the phrase encompasses whether a tax is fairly attributable to an activity carried on in the taxing state. *See* Hellerstein, *State Taxation, supra*, at 57. That is to say, to survive constitutional scrutiny, the Vermont tax must be fairly apportioned to the taxpayer's activities in Vermont. In the present case, the district court passed over this issue too hastily, concluding that the use tax applied only to use in Vermont and that all vehicles were therefore taxed equally based on their presence in the state. The logic of this premise –

and the State Commissioner's assertions along the same line – does not withstand scrutiny. The flaw in the reasoning becomes clear when use and sales taxes are examined together in the broader context of their impact on out-of-state goods.

A critical component in Vermont's scheme, one that appears as well in other compensating use taxes, is that use is only taxed through the surrogate of value. Although Vermont's "use" tax purports to tax use, in reality it actually taxes the value of goods or property just as does a sales tax. A use tax on "depreciated value" represents a necessary but imperfect approximation of the taxpayer's activities in the state. The perplexing question underlying this case – and for that matter all use tax cases – concerns the precise circumstances under which it will be fair for Vermont to apportion a tax on goods transported into the state based on the value of the goods. This question, into which the district court did not delve, requires closer examination.

The Supreme Court has begun to address the question of fair apportionment in greater detail in part through developing what is known as the internal consistency test. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) ("[W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent."). The internal consistency test, which was first propounded in *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983), has been applied to measure fair apportionment in a number of contexts. When taxes are complementary, the test examines a taxing scheme as a whole rather than focusing on one of its isolated components.

In *Goldberg*, the Court explained the test as follows: "[t]o be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261. Applying the test in *Goldberg* it was found that an Illinois 5 percent tax on interstate telephone calls was fairly apportioned, in part because multiple taxation was precluded by Illinois' credit for any taxes paid to other states. *See id.* at 265. Although in one case the Court noted that internal consistency is a component of both fair apportionment and non-discrimination against interstate commerce (the third *Complete Auto* factor), *see Armco Inc. v. Hardesty*, 467 U.S 638, 644 (1984), most of the cases discussing internal consistency do so in the context of fair apportionment. *See, e.g., Goldberg*, 488 U.S. at 260-61. The leading commentator on the subject considers internal consistency a component of fair apportionment. *See* Hellerstein, *Internal Consistency, supra*, at 175-79.

As plaintiffs correctly note, where the Supreme Court examines compensating use taxes under the internal consistency test, such taxes have been upheld as fairly apportioned when they provided for a credit, but have been rejected where no credit was allowed for taxes paid to other states. Thus, in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988), a 3 percent Louisiana use tax on out-of-state mail order catalogs shipped to customers in-state was held not to violate the Commerce Clause because the state granted a tax credit for sales taxes paid to other states, making the tax fairly apportioned. Similarly the telecommunications tax in *Goldberg*, 488 U.S. at 265, was upheld upon a finding that it was internally consistent and fairly apportioned because it provided for a credit

upon proof that another state had taxed a call subject to Illinois' tax.

In contrast, a manufacturing tax levied by the State of Washington that provided no such credit was struck down in *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 248-49 (1987), with the Court noting that an "exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other states would presumably cure the discrimination." In an earlier case decided long before the internal consistency test was born, the Supreme Court upheld a 2 percent Washington State use tax on tangible personal property where the state gave a credit for taxes paid in another state. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937).

Outside the case law, the importance of credits in saving compensating use taxes was also recognized prior to the advent of the internal consistency test. *See, e.g., Developments in the Law – Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 999 (1962) (noting "the main objection to allowing a state to adopt both [sales and use] taxes without a credit for previous sales taxes paid is that such combination tends to diminish interstate commerce whenever any other state has a sales or use tax"). Despite the key role credits have played in the constitutionality of state use taxes – before and after the internal consistency test came into favor – the Supreme Court has stopped short of declaring that credits are constitutionally required for all use taxes. Noting the Court's reluctance to do so, we too decline to hold that a credit is constitutionally mandated in the instant case.

At the same time we reject the Vermont Motor Vehicle Commissioner's argument that the use tax must survive because it taxes only the depreciated value and not the purchase price value of the vehicle. Closer analysis demonstrates that multiple taxation still results and the internal consistency test is still violated even when the use tax only taxes the auto's depreciated value on registration. A simple example illustrates the point. Consider two $10,000 cars on which two different states levy a 5 percent sales tax. If car A were purchased in state 1 and moved to state 2, it could then be subject to a use tax, at an assumed 5 percent of its depreciated value. If its depreciated value were $5,000, then car A would overall be subject to state 1's sales tax of $500 *plus* $250 in state 2's use tax. Car A would thus be taxed a total of $750 while car B, if it remained in-state, would only be subject to the initial $500 sales tax. Thus, multiple taxation of the interstate auto occurs even when a use tax is based on depreciated value. On the other hand, if a credit toward state 2's use tax were granted on car A for the taxes paid to state 1, then car A would only be taxed a total of $500 and no multiple taxation would result. *Cf.* Hellerstein, *Internal Consistency, supra,* at 159 (concluding that without credit provision all compensating use taxes violate internal consistency test).

Consequently, there are no obstacles to our determining that the Vermont motor vehicle tax fails the internal consistency test and thus is not fairly apportioned. Applying the test demonstrates that if all the states employed Vermont's tax plan, an automobile registered in several states during its useful life would be taxed considerably more than a vehicle that spent its entire life

in the same state. Absent a credit for taxes paid in other states, multiple taxation would heavily burden vehicles transported in interstate commerce, precisely the result the Commerce Clause was designed to prevent.

Although plaintiffs ask us to hold that a credit is affirmatively required if the statute is to be ruled constitutional, we decline this invitation to rechart our course because to adopt their suggestion would take us further from shore and give our holding a broader reach than necessary to decide this appeal. Examining the statute reveals that as it stands it does not fairly apportion the taxes. What is to be done now is a matter confided to the Vermont legislature. It may perhaps want to reexamine its motor vehicle tax program, and may or may not chose [sic] to include a credit, or it may decide to abandon its use tax altogether, or attempt to employ some other innovative tax to maintain its scenic roadways. While we acknowledge that were the statute to provide a credit it would no longer run afoul of the Commerce Clause, what steps are to be taken by the State of Vermont is up to that state's legislative body. We hold simply that as it stands, and for the reasons just given, Vermont's use tax is not fairly apportioned and therefore violates the Commerce Clause.

IV *Discrimination Against Interstate Commerce*

Appellants additionally declare the tax violates the Commerce Clause because it discriminates against interstate commerce. While we need not decide this issue, we address it to highlight the negative effects of the tax. Essentially appellants assert that due to the threat of

double taxation, newcomers to Vermont and Vermont residents "wintering" in other states are faced with an incentive to purchase a vehicle in Vermont. In that way, they aver, the tax skews business towards Vermont automobile dealers.

The district court admitted "[t]he tax can create an incentive to defer buying a car until after completing a move to Vermont," but somehow concluded the tax "does *not* necessarily create an incentive to buy the car in Vermont." *Barringer,* 801 F. Supp. at 1289. We think its conclusion incorrect. In the absence of a credit the Vermont tax discriminates against interstate commerce by providing an advantage to local producers whose products effectively will cost less and make out-of-state purchases disadvantageous. The Supreme Court has held repeatedly that "the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-74 (1988). While the Vermont Motor Vehicle Purchase and Use Tax differs from more blatantly discriminatory taxes in which out-of-state producers are taxed directly, *see Goldberg,* 488 U.S. at 265-66 (discussing facially discriminatory taxes), it is still problematic.

The discrimination component of the *Complete Auto* test has perhaps received more attention than any other in the Supreme Court's Commerce Clause jurisprudence involving facially discriminatory taxes. *See, e.g., Chemical Waste Management, Inc. v. Hunt,* 112 S. Ct. 2009, 2012-14 (1992) (Alabama statute imposing additional fee on hazardous waste generated outside Alabama and disposed of at Alabama facilities held to violate Commerce Clause

because it discriminated against interstate commerce on its face); *Armco*, 467 U.S. at 642 (West Virginia tax on gross receipts of businesses selling tangible personal property at wholesale, but granting exceptions from tax on sales by local manufacturers facially discriminated against interstate commerce). The question remains in this case as to whether a tax discriminates against interstate commerce when its secondary effects – not the operation of the tax on its face -- create a bias towards in-state purchases.

The Motor Vehicle Commissioner ignores this aspect of the discrimination issue and wrongly asserts that the statute does not discriminate against interstate commerce because all motor vehicles are taxed at the same percent based on their purchase price or book value. Under the relevant case law, discrimination against interstate commerce certainly may be shown by the discriminatory effects of a tax that is facially-neutral. *See, e.g., Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 406 (1984) (New York tax credit granted to parent corporations whose subsidiaries shipped exports from a place of business in New York discriminated against interstate commerce by providing commercial advantage to local business and foreclosing tax-neutral decisions); *Nippert v. City of Richmond*, 327 U.S. 416, 429-31 (1946) (municipal ordinance taxing traveling salesmen violated the Commerce Clause because its effects favored local merchants).

Numerous taxes have been invalidated due to their secondary, discriminatory effects based on the Commerce Clause. For instance, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), the Supreme Court noted no state may impose a tax that provides a direct commercial

advantage to local businesses. It struck down Hawaii's wholesale liquor tax that granted a tax exemption to wholesalers selling okolehao and other locally manufactured fruit wines. *Id.* at 273. Similarly, a Pennsylvania statute imposing lump-sum annual taxes on the operation of trucks on Pennsylvania highways was invalidated on the grounds that the taxes erected a financial barrier against interstate commerce. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 280-87 (1987). The Supreme Court emphasized that a state may not tax an event more heavily for having crossed state lines, even when the tax is not discriminatory on its face, if that is its actual effect. *See id.* at 280-81. Such discrimination may not be characterized as merely incidental, which is what the appellee appears to argue in this case. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69-75 (1963) (court looks not to theory but how statute operates in practice).

Appellants rightly point out that the Vermont tax scheme tends to induce individuals moving to Vermont to purchase their motor vehicles in Vermont. For one moving to Vermont, the tax scheme effectively lessens the cost of acquiring a vehicle if it is purchased there. The Commerce Clause prohibits that sort of local favoritism. Hence, we hold the Vermont Motor Vehicle Purchase and Use Tax violates the Commerce Clause of the United States Constitution. Vermont's scheme fails to pass constitutional muster for two reasons: it does not fairly apportion the tax among interstate and intrastate commerce and the tax operates in such a way as to effectively discriminate against interstate commerce in favor of Vermont businesses. The tax unfairly burdens interstate commerce essentially by exacting a greater tax on vehicles

transported into Vermont from other states than it does on Vermont-based vehicles not so transported.

CONCLUSION

The judgment of the district court is accordingly reversed, and Vermont Motor Vehicle Purchase and Use Tax, Vt. Stat. Ann., title 32, ch. 219, is declared unconstitutional and void to the extent that the use tax is collected from out-of-state residents without crediting sales taxes they may have paid to other states.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

If my colleagues had decided to affirm the judgment of the district court, I would have been content to rest my concurrence on the well-written opinion of Chief Judge Parker reported at 801 F. Supp. 1282. However, because my colleagues have opted to reverse and their troublesome interpretation of the concepts of apportionment and internal consistency may lead to further review, I believe that I should state briefly why I believe that Chief Judge Parker was correct.

The State of Vermont operates on the practical theory that resident owners of vehicles registered and operated in Vermont should contribute to the cost of maintaining Vermont's highways. To accomplish this, Vermont levies a tax on Vermont residents' initial registration of pleasure vehicles in the State, which, in general, is equal to five

percent of each vehicle's value. If the vehicle was purchased in Vermont, the tax is called a "sales" tax; if the vehicle was purchased elsewhere, the tax is called a "use" tax. Regardless of nomenclature, the taxes are in the same amount, i.e., five percent. There is no claim that this amount is excessive or not fairly related to the benefits received.

Because of my colleagues' emphasis on apportionment and internal consistency, it is important, I think, that we pinpoint exactly what is and what is not involved in this case. This case does not involve a tax levied on a so-called "unitary business," the customary genre of the internal consistency rule. *See Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991); *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 229 (1980). It involves two individuals, each of whom purchased and operated a pleasure vehicle in Connecticut where he or she resided and thereafter moved with the vehicle to Vermont. It does not involve owners who are using their vehicles in an interstate commercial operation only part of which takes place in the State of Vermont. It involves Vermont residents who pay a five percent initial registration tax on their pleasure vehicles as their contribution to the cost of maintaining Vermont highways. Under the circumstances, I agree with Chief Judge Parker's comments concerning the irrelevance of fair apportionment in the instant case. *See* 801 F. Supp. at 1285-86.

The mechanics of unitary business taxation is discussed in some detail in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983), and more recently in *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251

(1992). For our purpose, the following excerpt from *Container Corp.* is illustrative:

> Having determined that a certain set of activities constitute a "unitary business," a State must then apply a formula apportioning the income of that business within and without the State. Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair. The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency – that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed.

463 U.S. at 169 (citations omitted).

There is no issue of apportionment in the instant case. To apportion means to divide. *Black's Law Dictionary* 128-29 (rev. 4th ed. 1968). The tax at issue is a charge levied on Vermont inhabitants for the use of Vermont highways. It " 'cannot be repeated by any other state.' " *Quill Corp. v. North Dakota*, 112 S. Ct. 1904, 1919 (1992) (White, J., concurring in part, dissenting in part) (quoting *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 96-97 (1948) (Rutledge, J., concurring)). Conceivably, if appellants moved from Vermont to another state, that state could impose a tax for the use of its highways. That, however, would be a tax by a different entity based on a different use. "[C]lassification based upon residency is a rational way to assess for road use." *Williams v. Vermont*, 472 U.S. 14, 36 (1985) (Blackmun, J., dissenting). Moreover, we are not concerned here with phantom peripatetic owners who move with their cars from state to state to state. To

the extent that appellants' pleasure cars were involved in interstate commerce when appellants moved with the cars from Connecticut to Vermont, that involvement has ceased – apparently permanently. Although my colleagues discuss apportionment at some length, neither appellants nor my colleagues state what the Vermont tax should be apportioned with or against. Appellants' actual contention is that anyone who pays a sales tax when purchasing a car in Connecticut is entitled to a free ride on the highways of Vermont if, one, two, three, four or five years following the purchase, he or she moves with the car to Vermont. I find nothing in the Constitution that entitles them to this benefit.

As the Supreme Court state in *Williams v. Vermont, supra,* Vermont's use tax is not typical of taxes bearing this name, because it was not designed to protect Vermont's revenues by taking away the advantages of residents traveling out of the state to make purchases at lower costs than would be available in Vermont. *Id.* at 24-25. It was designed pursuant to the principle that "those using [Vermont's] roads should pay for them." *Id.* at 25. In order for Vermont to make fair charges for the use of its highways it had to adopt some means of measuring use that was practical in operation and possessed at least a modicum of accuracy. Because of their shorter life expectancy, older vehicles ordinarily will make less use of highways than will newer and more highly valued cars. Accordingly, a tax that is based on a car's value bears at least a rough relationship to the benefits the car's owner will receive. In *Williams, supra,* the Supreme Court found this relationship sufficient to withstand constitutional scrutiny:

> [D]espite the looseness of the fit, we would be hard pressed to say that this manner of funding highway maintenance and construction is irrational. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), quoting *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)

Id. at 25 n.9.

In *United States v. City of Detroit*, 355 U.S. 466 (1958), the Government, similarly to my colleagues herein, argues that since the tax involved was "measured by the value of the property used it should be treated as nothing but contrivance to lay a tax on that property." *Id.* at 470. Rejecting this argument, the Court said:

> We do not find this argument persuasive. A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country.

Id.

In short, I am compelled to disagree with my colleagues' assertion that, "[a]lthough Vermont's 'use' tax purports to tax use, in reality it actually taxes the value of goods or property just as does a sales tax." *Supra*, at 12.

Vermont's use tax on motor vehicles is based upon an estimated use of Vermont's highways, in the same manner and in the same amount as is Vermont's sales tax on motor vehicles. Because a similar calculation is made for

both use and sales taxes, I am unmoved by my colleagues' plaint that "use taxes like Vermont's fall most heavily on owners of out-of-state autos." *Supra*, at 9. Of course they do. Owners of cars purchased in Vermont pay a sales tax which is for the same amount as the use tax and therefore falls with equal and off-setting weight on those owners. The fairness of a tax is determined by its effect, not by its name.

It is too late in the day to successfully contend that a state may not levy a tax such as Vermont's use tax simply because it may have some adverse effect on interstate commerce. A state " 'is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.' " *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981) (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)), *see Quill Corp. v. North Dakota, supra*, 112 S. Ct. at 1912 n.5. That, I believe, is precisely what Vermont is doing in this case.

Fairness, I suggest, is a two-way street. Those Vermont inhabitants who purchased their cars in Vermont get no benefit whatever from sales taxes paid by other residents who purchased their cars while residing in Connecticut. The latter, however, get the same benefits from highway improvements, traffic control, removal of snow and other debris as do the former. Vermont asks only that both pay a like amount for benefits equally received. I see

nothing violative of the Constitution in this. I would affirm.[1]

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[1] Because Norman Williams, the plaintiff in *Williams v. United States, supra*, and one of the counsel for appellants herein, has made somewhat of a career out of challenging the Vermont statute at issue herein, I cannot fault the district court for denying Williams' last minute motion to amend the complaint to assert a cause of action under the Privileges and Immunities Clause of the Constitution. In any event, I believe the end result would be same if the amendment had been granted.

VERMONT STATUTES ANNOTATED

* * *

TITLE THREE
Executive

* * *

Chapter 25. Administrative Procedure

* * *

§ 801. Short title and definitions

* * *

(b) As used in this chapter:

* * *

(2) "contested case" means a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;

* * *

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§ 815. Judicial review of contested cases

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the supreme court, unless some other court is expressly provided by law.

* * *

TITLE TWENTY-THREE
Motor Vehicles

* * *

Chapter 7. Registration

SUBCHAPTER 1. GENERAL REGISTRATION

ARTICLE 1. GENERAL PROVISIONS

§ 301. Persons required to register

Residents as defined in section 4 of the title, except as provided in section 301a and chapter 35 of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

* * *

TITLE THIRTY-TWO
Taxation and Finance

* * *

Chapter 219. Motor Vehicle Purchase and Use Tax

* * *

§ 8901. Purpose

This is an act to impose a purchase and use tax on motor vehicles in addition to any other tax or registration fees. The purposes of this chapter is to thereby improve

and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter.

* * *

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§ 8903. Tax imposed

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be five percent of the taxable cost of any pleasure car as defined in 23 V.S.A. § 4.

* * *

(b) There is hereby imposed upon the use within this state a tax of five percent of the taxable cost of any pleasure car as defined in 23 V.S.A. § 4.

* * *

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§ 8905. Collection of tax

(a) Every purchaser of a motor vehicle subject to a tax under subsection (a) of section 8903 of this title shall forward such tax form to the commissioner, together with the amount of tax due at the time of first registering or transferring of a registration to such motor vehicle as a condition precedent to registration thereof.

(b) Every person subject to a use tax under subsection (b) of section 8903 of this title shall forward such tax form and the tax due ~~to the~~ commissioner with the registration application or transfer, as the case may be, and fee at the time of first registering or transferring a registration to such motor vehicle as a condition precedent to registration thereof.

* * *

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§ 8912. Allocation of funds

The taxes collected under this chapter shall be paid into and accounted for in the transportation fund.

* * *

§ 8914. Refund

Any overpayment of such tax as determined by the commissioner shall be refunded.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

GREG R. BARRINGER and JUDITH M. BARRINGER, Plaintiffs,	)	Civil Action No. 2:91CV231
v.	)	JURY
MICHAEL D. GRIFFES, Defendant.	)	DEMAND
	)	(Filed Aug. 27, 1991)

COMPLAINT

Nature of Action

1. This is an action for declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 1988 and the Commerce Clause of the United States Constitution. Plaintiffs seek a declaratory judgment that Vermont's motor vehicle purchase and use tax, 32 V.S.A. §§ 8901 *et seq.*, violates the Commerce Clause by failing to provide a tax credit for sales taxes paid in other states. Plaintiffs also seek to enjoin Defendant from collecting the tax as a condition to registering Plaintiffs' automobile in Vermont.

Jurisdiction

2. This Court has federal question jurisdiction over this action under 28 U.S.C. § 1331. Venue is proper under 28 U.S.C. § 1391(b), since the Defendant resides in this district. The action is not barred by 28 U.S.C. § 1341, since no plain, speedy and efficient remedy exists in the courts of the State of Vermont.

Parties

3. Plaintiffs Greg R. Barringer and Judith M. Barringer are residents of Middlebury, Vermont.

4. Defendants Michael D. Griffes is Commissioner of the Vermont Department of Motor Vehicles. In that capacity, he is charged with and does collect motor vehicle purchase and use taxes under 32 V.S.A. § 8905 in the amount of four percent of the value of the motor vehicle, without granting any credit for sales taxes previously paid in other states.

Facts

5. Plaintiffs purchased a 1988 Mazda 626 LT for $14,769 from Partyka Chevrolet in Hamden, Connecticut, on September 23, 1988.

6. At the time of purchase, Plaintiffs were residents of Connecticut. In accordance with Connecticut law, they paid a state sales tax of 7.5 percent, or $1,085.18, at the time of purchase.

7. Plaintiffs moved to Middlebury, Vermont on August 25, 1990. Under 32 V.S.A. § 8903(b), they are required to pay a tax of four per cent of the value of their automobile upon first registering it in Vermont.

8. Prior to September 1, 1980, non-residents like Mr. and Mrs. Barringer who purchased, paid tax, and registered their cars in other states were exempt from the Vermont motor vehicle purchase and use tax under 32 V.S.A. § 8911(6).

9. Effective September 1, 1980, the Vermont state legislature repealed the tax exemption for non-residents under 32 V.S.A. § 8911(6). Based on that repeal, Defendant collects the motor vehicle purchase and use tax from non-residents without granting a tax credit for sales taxes paid in other states.

10. In September, 1990, Plaintiffs called the Vermont Motor Vehicle Registration Department and were advised that they would have to pay a sales and use tax in the amount of four percent of the value of their automobile before it could be registered. They were further advised that their automobile had an approximate value of $7,000, thus requiring sales and use tax in the approximate amount of $280.

11. Under 32 V.S.A. § 8920, Plaintiffs are subject to interest charges of 15 per cent per year and an additional penalty of five per cent per month, up to 25 per cent per year, if they do not pay the motor vehicle purchase and use tax when due. In addition, under 32 V.S.A. § 8909 Defendant is authorized to suspend Plaintiffs' right to operate *any* motor vehicle in the event of non-payment. Fines and jail term also may be imposed. 23 V.S.A. § 421.

Legal Claim

12. Imposition of the motor vehicle purchase and use tax under 32 V.S.A. §§ 8903(b) and 8911(9) without affording Plaintiffs a pro rata tax credit for sales taxes previously paid to Connecticut violates their rights under 42 U.S.C. § 1983 and the Commerce Clause of the United States Constitution, Art. I, § 8, Cl.3.

Relief

Plaintiffs request that judgment be entered:

1. Declaring that 32 V.S.A. §§ 8903(b), 8909, and 8911 are unconstitutional and void insofar as they fail to afford a pro rata tax credit to Plaintiffs for motor vehicle sales taxes paid to Connecticut;

2. Enjoining Defendant from imposing civil or criminal sanctions and from collecting motor vehicle sales and use taxes under 32 V.S.A. § 8903(b) as a condition to registering Plaintiffs' automobile in Vermont without affording a pro-rata tax credit for motor vehicle sales taxes already paid to Connecticut;

3. Awarding Plaintiffs reasonable attorney's fees, as authorized by 42 U.S.C. § 1988.

Jury Demand

Plaintiff requests a trial by jury on all issues so triable.

Dated: Burlington, Vermont
August 27, 1991

PLAINTIFFS

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

GREG R. BARRINGER	*	
JUDITH M. BARRINGER	*	
V	*	
	*	CIVIL FILE NO.
MICHAEL D. GRIFFES	*	91-231

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
Friday, August 14, 1992
Burlington, Vermont

BEFORE:

THE HONORABLE FRED I. PARKER
Chief District Judge

APPEARANCES:

JEROME F. O'NEILL, ESQ., O'Neill & Crawford, P.C., 1 Lawson Lane, Burlington, Vermont; Attorney for the Plaintiffs

NORMAN WILLIAMS, ESQ. Gravel and Shea, 76 St. Paul Street, Burlington, Vermont; Attorney for the Plaintiffs

WILLIAM E. GRIFFIN, ESQ., Vermont State Attorney General's Office, 109 State Street, Montpelier, Vermont; Attorney for the Defendant

THOMAS R. VIALL, ESQ., Vermont Agency of Transportation, 133 State Street, Montpelier, Vermont; Attorney for the Defendant

* * *

Barringer, J. – Direct

[p. 13] THE COURT: Mrs. Barringer, if I understood your testimony correctly, the registration would have expired on the 626 in May of '92; is that right?

THE WITNESS: That's correct.

THE COURT: Now, is that – do I conclude from that that you have been unable to operate that car from May of '92 until the present?

MR. O'NEILL: If it please the Court, if the Court would permit me to step into the midst of that conversation for just a moment. I ask that because in the course of the deposition that we had with the State on these issues yesterday, Mr. Griffin asked some questions which related to that specific issue.

[p. 14] We will not represent to the Court as a matter of fact that the vehicle has not been used since the time the registration expired. When inquired into those questions yesterday in the course of the deposition, I inquired of the State as to whether or not they would agree that the Barringers would not be prosecuted for use of the vehicle after it was registered, and if not we would have them assert their Fifth Amendment. Therefore, Mr. Griffin indicated they would not so state and, therefore, the Barringers have asserted the Fifth Amendment in response to questions as to whether or not they have driven the car after the time the registration expired in May of this year. I think the Court's question in effect called for that, and if inquired of, that's the response that Mrs. Barringer would make to inquiry.

THE COURT: That's fine. I don't have any problem with that, but it goes to the issue of irreparable harm, and I think it leaves me in the position – I have to think this through because there's a constitutional right involved here, but the question is unanswered so I probably am in no position to make a finding that the automobile has been used, but the flip side of that is that there has been no showing of nonuse, which undercuts the claim of irreparable harm, I think.

I understand the portion of the irreparable harm claim that goes to Ms. Barringer's concern about operating a standard shift, and the dangers there, but I have this kind of [p. 15] black hole of – from May '92 until the present, with respect to nonuse.

MR. O'NEILL: I think, your Honor, I believe – and the Court may not be satisfied that we have dealt with that. I think that issue was responded to when I asked if they were deprived of the full – if she was deprived of the full legal use of the vehicle by virtue of the fact that the tax had not been paid, or the fact that this tax was imposed.

THE COURT: Are your suggesting I should infer that there might be – that there might have been illegal use because of the nature of that question and answer?

MR. O'NEILL: All I'm suggesting about it, Judge, is is that whatever use there may have been – and I repeat to the Court that I am not representing to the Court that the car has simply been parked. I don't won't [sic] do that, but what I'm saying about it is that Mrs. Barringer responded to the question – to my question that

she has been deprived of the full legal use of the vehicle which, by virtue of the tax, which we think deals with that issue, in other words, establishes the fact that she has not had available to her for its full legal use, the vehicle, as it would have been if the tax had been paid.

* * *

Barringer, J. – Cross

[p. 24] Q It's my understanding that Connecticut has a local personal property tax on motor vehicles?

A Yes, it does.

Q An annual tax?

A Yes.

Q And it's also my understanding that you paid that tax in '88 and '89, and '90; is that correct?

A To the best of my my recollection, yes. I remember paying it in '90. And I remember –

Q And you do remember paying it in '90?

A Yes.

Q And you did not pay it in 1991?

A No.

Q And did not pay it in 1992?

A No.

* * *

[p. 25] THE COURT: What was the date of your move from Connecticut?

THE WITNESS: August 1990.

THE COURT: Okay. And is the reason why the personal property tax – Connecticut personal property tax wasn't paid in '91 and '92 because of the fact that you moved here?

THE WITNESS: That's correct.

THE COURT: Do you know what that tax is? Is it a percentage of value or how it's calculated?

THE WITNESS: I really am not sure.

THE COURT: Do you know the amount?

THE WITNESS: I don't recall the amount. All I recall was that it was extraordinarily large.

* * *

Barringer, G. – Direct

[p. 31] Q Did you make any inquiries to the State about registering the vehicle?

A Yes. Shortly after we arrived in Vermont in August of 1990, I would guess it was either August or September or October of '90, I called the Vermont Department of Motor Vehicles. I spoke with a gentleman. I did not obtain his name.

Q What did he tell you?

A He told me that we would be required to pay the Vermont sales and use tax in order to register our car in Vermont. He also told me that the tax is assessed based

on the value of the car. He pulled out apparently his Blue Book, I believe they're referred to, which is a statement of values of various motor vehicles. He told me what the fair market value was of our vehicle, according to his Blue Book, and told me how much the tax would be.

* * *

Barringer, G. – Cross

[p. 33] Q Did you ever inquire as to the refund process for obtaining a refund in the event that you had paid the tax in 1990?

A I did not ask that question to the gentleman I spoke with at the Department of Motor Vehicles. Subsequent to my joining the firm of Down, Rachlin & Martin, I had spoken with a number of colleagues who told me that there was this tax in the state of Vermont, that there had been ongoing litigation as to its constitutionality.

Q Have you ever spoken to the defendant about the refund?

A No.

MR. O'NEILL: Excuse me, your Honor. Object to that question because I don't think it's relevant in any way to these proceeding. [sic] Question of whether a refund is available is answered by the Second Circuit's determination. I don't think it makes any difference as to whether he has made any inquiry. It's irrelevant.

MR. GRIFFIN: I disagree, your Honor. I think the Second Circuit made a decision without a record, and I'm proposing to make a record.

THE COURT: I understand what your position is. I'll overrule the objection and listen to the inquiry, for what [p. 34] it's worth.

MR. O'NEILL: Thank you, your Honor.

Q I think you completed your answer, that you did not speak to the defendant?

A I did not ask the Department of Motor Vehicles but I had learned from other sources that there was this ongoing litigation and there was no refund available.

Q My question was to the defendant and to his representatives at the department.

A Okay. No, I did not ask the State.

* * *